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Supreme Court of the United States

October Term, 1957

No. 377

WILLIE BENNETT,

Petitioner,

against

S.S. MORMACTEAL, her engines, etc., and MOORE McCORMACK LINES INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STANDARD, WEISBERG, HAROLDS & MALAMENT,
VINCENT J. LONGHI,
Attorneys for Petitioner.

LOUIS R. HAROLDS,
of Counsel.

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Willie Bennett, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit (hereto appended and marked Appendix A), affirming a decree of the United States District Court for the Eastern District of New York (hereto appended and marked Appendix B), dismissing a longshoreman's personal injury libel, on motion following exceptive allegations made on behalf of the respondent.

I.

Opinions Below

The opinion of the District Court does not appear in the Official Reporter. The Court of Appeals for the Second Circuit affirmed the decree of the District Court on the opinion below, without a separate opinion.

II.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed was dated and entered on March 13, 1958 (Appendix A).

The jurisdiction of the district court was based on a maritime action within the admiralty and maritime jurisdiction of the District Courts of the United States as conferred by Act of June 25, 1948, c. 646, 62 Stat. 931, amended May 24, 1949, c. 139, Sec. 79, 63 Stat. 101, 28 U. S. C. Sec. 1333. The jurisdiction of the court below was based on Act of June 25, 1948, c. 646, 62 Stat. 929, 28 U. S. C. Sec. 1291.

The jurisdiction of this Court to review by writ of certiorari the judgment complained of is conferred by Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U. S. C. Sec. 1254(1) and by Act of June 25, 1948, c. 139, Sec. 106, 63 Stat. 104, 28 U. S. C. Sec. 2101(c).

III.

Questions Presented

1. In a suit in Admiralty, *in rem*, against a vessel, for damages for personal injuries caused by its unseaworthiness and/or negligence, does Section 5 of the Longshoremen & Harbor Workers Act preclude a suit for damages against the ship, where the owner and operator of the vessel is also the employer of the injured seaman (longshoreman)?

2. Was the Longshoremen & Harbor Workers Act intended to give steamship companies an option to deprive such injured maritime workmen of their traditional right to sue the offending steamship company *in personam*, or

the offending vessel *in rem* (for damages for personal injuries), by the device of directly employing such seamen (longshoremen), instead of engaging them through an independent stevedoring firm?

3. Where seamen (longshoremen) who specialize in loading operations, are employed directly by the steamship company, instead of through an independent stevedoring firm, are they deprived of the right to sue *in personam* for damages for personal injuries caused by the vessel's negligence, under the provisions of the Jones Act (46 U. S. C. A., Sec. 688), and/or caused by unseaworthiness under the General Maritime Law, i.e., are they limited solely to the Workmen's Compensation remedy by virtue of Section 5 of the Longshoremen & Harbor Workers Act?

IV.

Federal Laws and Statutes Involved

The General Maritime Law, which is the common-law of the sea, provides that seamen who happen to specialize in cargo loading operations (longshoremen) are today entitled to sue for damages for personal injuries caused by the negligence of the ship operator and/or the vessel's unseaworthiness, even when employed by an independent stevedoring firm, as they could when employed directly by the steamship companies, in order to carry out the broad beneficient policies of the law.

See *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 66 S. Ct. 872 (1946), where the court stated at page 90:

> "There could be no question of petitioner's liability for respondent's injuries, incurred as they were here, if he had been in petitioner's employ rather than hired by the stevedoring company. That an owner is liable to indemnify a seaman for an injury caused by the unseaworthiness of the vessel

or its appurtenant appliances and equipment has been settled law in this country even since the Osceola, 189 U. S. 158, 23 S. Ct. 483, 47 L. Ed. 760."

The General Maritime Law also personifies the ship, providing for *in rem* liability of the offending vessel, regardless of whether there is, or is not, *in personam* liability on the part of the operating steamship company.

Canadian Aviator Ltd. v. *U. S.*, 324 U. S. 215, 224, 65 S. Ct. 639, 644 (1945);
Grillea v. *U. S.*, 232 F. (2d) 919 (C. A. 2nd, 1956).

The Jones Act (46 U. S. C. A. Section 688) provides as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides on in which his principal office is located. Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185; June 5, 1920, c. 250, § 33, 41 Stat. 1007."

The Jones Act provided a remedy applicable to all "seamen", including those who engaged solely in longshore activities.

Atlantic Transport Co. v. *Imbrovek*, 234 U. S. 52, 34 Sup. Ct. 733 (1949);

Int'l Stevedoring Co. v. Haverty, 272 U. S. 50, 47 Sup. Ct. 19 (1926);
Uravic v. *Jarka*, 282 U. S. 234, 51 Sup. Ct. 111 (1931).

Section 5 of the Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, c. 509, 44 Stat. 1424, 1426, 33 U. S. C. Secs. 901, 905:

> "The liability of an employer prescribed in Section 904 of this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law, or in admiralty, for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow-servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

V.

Statement of the Case

The issues herein have been determined without a trial, solely on exceptive allegations. The libel was filed in Admiralty against both the vessel, *in rem*, and the employer steamship company, *in personam*.

The libel alleged that on or about May 29th, 1953, one Willie Bennett was working as a longshoreman aboard the vessel, *S.S. Mormactral*, a vessel operated by respondent,

Moore McCormack Lines, Inc., then lying in navigable waters in the port of New York. On that occasion, a hatch cover gave way beneath him, causing him to fall and sustain injuries. It was alleged that the hatch cover gave way because of the negligence and/or unseaworthiness of the vessel, its appliances and appurtenances, and the operating steamship company.

Proctors for the vessel and its owner then filed exceptions to the libel, seeking a dismissal of the suit for the following reasons: Moore McCormack Lines, Inc. was not only the owner and operator of the vessel, but it was also the direct employer of the longshoremen who were working on the ship, including the libellant. The exceptions further claimed that since libellant's employer was covered by Workmen's Compensation, the vessel and its operator became immunized from legal liability for damages, by virtue of the provisions of 33 U. S. C. A. 905. These exceptions were sustained, the suit was dismissed, and this was affirmed on appeal.

The courts below have held that the Longshoremen's Compensation Act deprived such injured workers, not only of their right to sue the ship operator *in personam* for damages, but also deprived them of their traditional right to sue the vessel *in rem*, in instances in which the personal injuries are brought about by the negligence and/or unseaworthiness of the vessel.

It is necessary to consider the historical background, in order to appreciate the impact of this holding.

VI.

Argument

1. Originally, the seamen themselves not only sailed their vessels, but also loaded and unloaded the cargo. By the time th Jones Act (46 U. S. C. A., Sec. 688), was

adopted, the age of specialization had set in, and ship operators generally were engaging independent stevedoring companies as contractors, to perform the loading and unloading of their vessels. The ship operators would employ the seamen; the stevedoring companies would employ the longshoremen. It was soon held that those maritime workmen who were now specializing solely in cargo handling operations (longshoremen), did not lose their status as seamen, and that they were entitled to sue the independent stevedoring firms which employed them, for damages, under the Jones Act, as they could when employed directly by the steamship companies.

Atlantic Transport Co. of W. Va. v. *Imbrovek*, 234 U. S. 52, 34 Sup. Ct. 733 (1914);
Int'l. Stevedoring Co. v. *Haverty*, 272 U. S. 50, 47 Sup. Ct. 19 (1926);
Uravic v. *Jarka*, 282 U. S. 234, 51 Sup. Ct. 111 (1931).

These decisions have never been overruled, so as to change the right of maritime workers to sue *employer-steamship companies* for damages for personal injuries when they are, as here, directly employed by them.

Respondents argue that when Congress enacted the Longshoremen's and Harbor Workers' Act in March, 1927, only five months following the *Haverty* case, it must have intended to overrule the force of those decisions. But in the *Haverty* case, the injured longshoreman was employed by an independent stevedoring company, and not by a steamship company. Therefore, the intent being to overrule *Haverty*, Congress was simply providing a compensation act for independent stevedoring companies, in lieu of Jones Act liability.

2. The decision of the Court below is contrary to the intention of the Congress in passing the Longshoremen's and Harbor Workers Compensation Act and is unsupported by the specific terms of the Act, or its legislative history, particularly with reference to *in rem* liability.

The Compensation Act was enacted only five months after the decision of this Honorable Court in *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50 (1926) which had found a longshoreman employed by an independent stevedore to be a "seaman" under the Jones Act. It was this employment relationship that Congress had in mind when it provided for an exclusive liability of the "employer" for compensation.

While in no way conclusive, nevertheless the Congressional Committee hearings prior to the adoption of the Compensation Act are of some assistance. Thus, in describing before the Senate Judicial Committee how repairs are made, Mr. Chlopek, then President of the International Longshoremen's Association, agreed that it was the same as loading and unloading and declared "The steamship owner contracts with a stevedoring company to load or discharge his cargo." Hearings, Sen. Jud. Comm., 69th Congress 1st Session on S. 3170 (March 16, 1926), p. 24.

In the hearings before the Committee on the Judiciary of the Senate (69th Congress, 1st Session) on S. 3170, held on March 16 and April 2, 1926, there was included a discussion of the previous attempts to have longshoremen covered by state compensation laws. Attorney J. P. Chamberlain, representing the Longshoremen's Union, stated at page 19:

> "* * * it was based on the theory that it was in practice very difficult to administer a compensation law affecting these employees in ports all over the country—and those employees were carpenters, upholsterers and men of various types who were local workers, working not for the ships but for local employers, that is, for local stevedores, local drydock companies, and local contractors for repairs to vessels—and that they should be taken care of as are other workers under the state law."

William F. Dempsey of Dorchester, Mass., representing the International Longshoremen's Association, stated at page 25:

> "* * * When the ship is tied up to the dock the operating crew are through with the vessel—except to clean places where the captain wants them to clean up. Then the owner of the vessel, or the agency of the vessel leaves the work of unloading the cargo and loading the cargo to others, lets it out to contract. The contractor is termed the stevedore, and in our agreements he is called the master stevedore. We are termed longshoremen. The master stevedore of one contractor hires certain gangs of men to work * * *."

Similarly, in the hearings before the Committee on the Judiciary of the House of Representatives (69th Congress, 1st Session) on H. R. 9498, held on April 8, 15 and 22, 1926, Mr. Cletus Keating, representing the American Steamship Owners Association, stated there, at page 100:

> "* * * these stevedores and shipwrights who are principally affected are employees of local concerns."

Finally, Section 52 of the Act, as proposed in both the House and Senate bills, originally provided:

> "No vessel shall be allowed clearance by the collector of any port unless the master or agent shall satisfy the collector that the provisions of this act requiring the securing of compensation for work done in respect to such vessel have been complied with."

This Section was replaced by a significantly different provision, which became 33 U. S. C., Section 937 of the Act. This change was suggested by Mr. Cletus Keating, representing the American Steamship Owners Association (see p. 99 of the Hearings before the Judiciary Committee of the House of Representatives, *supra*). Section 937, as enacted, provides:

> "No stevedoring firm shall be employed in any compensation district by a vessel or by hull owners until

> it presents to such vessel or hull owners a certificate issued by a deputy commissioner * * * that it has complied with the provisions of this chapter requiring the securing of compensation to its employees * * * ."

On this change, Mr. Chlopek stated at page 214:

> " * * * the proposal as passed by the Senate—and as we are asking you to recommend it, gentlemen—absolutely creates no hardship upon the vessel. The law simply would require the vessel owner to ask the stevedore who is going to do his ship stevedoring, 'Have you complied with this act?' And if he has failed to prove that he has complied with it he can not hire that man * * * ."

The punitive provisions of Section 937, limited as they are to stevedoring firms, as distinct from the language in the bill as originally proposed, would seem to be not without significance.

In the *Pacific Pine*, 31 F. (2d) 152 (D. C. Wash., 1929), an injured longshoreman employed by an independent stevedoring firm, sued a vessel *in rem*, based upon a claim that his injuries had been caused by negligence and unseaworthiness. The vessel sought a dismissal on the ground that workmen's compensation was his exclusive remedy, and the right to sue a "third person" as preserved by the Compensation Act, did not include a suit against the vessel. In sustaining the longshoreman's right to sue the vessel *in rem* for damages, Judge Cushman stated at page 1955:

> "The dominant purpose of the Longshoremen's and Harbor Workers Compensation Act being to put a new lamp in the place of old ones, it is not reasonable to conclude that the old rights, which were intended to be extinguished, would be left to be inferred from part of a section relating to procedure."

The *Pacific Pine* was cited with approval in *Seas Shipping Co. v. Sieracki; supra*, at Note 21, but in both of these

cases, the injured workmen was in the employ of an independent stevedoring contractor, and was not on the direct payroll of the steamship company.

As recently as June 2, 1958, this Honorable Court granted certiorari in *Hahn v. Cross Island Sand & Gravel Co.*, 320 P. 2nd 668 (Sup. Ct. Oregon, 1958), in which case the Oregon courts had held that the Longshoremen & Harbor Workers Act affords an exclusive remedy to a maritime workman suing his employer for injuries sustained aboard a barge on Oregon navigable waters. Although the injured man was employed directly by the company, he claimed that he was entitled to sue his employer for damages under a state liability act, which permitted such suits, based upon allegations of negligence. Having consented to review that decision, this Honorable Court will be called upon there to consider whether the Longshoremen's Compensation Act provides an exclusive remedy, or whether such a maritime employee may elect to sue his employer for damages under a state liability act. In the suit at bar, the petition herein respectfully requests this Honorable Court to review another aspect of the same problem, i.e., whether the Longshoremen's Compensation Act provides an exclusive remedy, or whether the right to sue the employer steamship operator and the vessel for damages, survives under federal law, i.e., the Jones Act and/or General Maritime Law.

The question raised by this petition has never been passed upon on the merits by this Honorable Court, and it is growing in importance by reason of the following additional developments in the industry:

3. We have seen that the seamen originally loaded and unloaded their ships; but with increased industrialization, they were replaced by stevedoring firms which provided longshoremen employed by the contractors.

In 1932 the United States Department of Labor noted a developing practice of a return to direct employment by

shipowners among the "larger shipping companies". ("Cargo Handling and Longshore Labor Conditions," U. S. Dept. of Labor, Bureau of Labor Statistics, No. 550 [Feb. 1932], p. 2). By 1951, the practice of direct employment had become quite widespread. A New York Board of Inquiry investigating the Port of New York found that "Many shipping concerns engaged in coastal and intercoastal trade * * * often engage men directly to do their stevedoring work * * *." (Final Report to the Industrial Commissioner, State of New York from Board of Inquiry on Longshore Industry Work Stoppage October-November, 1951, Port of New York [Jan. 22, 1952], pp. 48-49). The practice of direct employment has become so pronounced that shipowners comprise over 40 per cent of the members of the New York Shipping Association which represents all but one of the large employers of longshoremen in their collective bargaining and labor negotiations with the union representatives of the longshoremen and related dock workers. *Final Report * * * from Board of Inqury, supra,* p. 40.

The result of the decision below is that, in the Port of New York, for example, about half of the longshoremen will be able to bring suit against a vessel for her unseaworthy and or negligent condition, while the other half will be precluded from doing so by reason of the fortuitous circumstance that the latter group is employed by the shipowners directly. While both groups have a statutory right to compensation from their employer under the Longshoremen's and Harbor Workers' Compensation Act, one group is being denied an established maritime right to recover damages for injuries, a circumstance which has been regarded as a factor in preventing accidents in the longshore industry. ("Longshore Safety Survey," Maritime Cargo Transportation Conference [National Academy of Sciences —National Research Council Pub. 459 1956], p. 7.)

The final result of the rule enunciated by the Courts below might well be the total elimination of the right of

longshoremen to bring suit against a vessel for injuries sustained due to unseaworthiness and negligence. The shipowners are thereby attempting to eliminate the cost of liability insurance to cover longshoremen, while assuming directly only the cost of workmen's compensation coverage for employee longshoremen. (This latter coverage is a burden which the ship owners now bear indirectly as part of the cost of longshore services by independent contractors.)

4. From the shipowners' point of view the decision below creates a distinction which tends to favor the larger companies by placing them in an economically advantageous position in regard to the cost factors in the shipping industry, as opposed to the steamship companies which are required to engage longshoremen through independent stevedoring firms. Such a result was clearly not a part of the original intent of the Compensation Act.

Workmen's compensation insurance rates for longshoremen are substantial. For the Port of New York the insurance rate was set at $13.00 per $100 of payroll. ("Longshore Safety Survey," Maritime Cargo Transportation Conf. [National Academy of Sciences—National Research Council Pub. 459, 1956].). If the amount of compensation premiums paid by the employer are above a minimum size, the employer is entitled to a reduction in rate commensurate with his accident record. (Hearings, Comm. on Ed. & Lab., Sp. Subcom., 84th Cong. 2nd Sess., "Bills Relating to the Longshoremen & Harbor Workers' Compensation Act," testimony of William Leslie, Jr., General Manager, National Council on Compensation Insurance, p. 157.) Only the employers who perform a great deal of loading and unloading can take advantage of this reduced rate.

Thus, the large shipping companies who employ their longshoremen directly, may not only have a reduced workmen's compensation insurance rate, but, by virtue of this decision, they can also eliminate the cost of liability damage

insurance coverage for their employee-longshoremen. Since regular need stimulates direct employment of the longshoremen (See Final Report to the Industrial Comm'r, State of New York from Board of Inquiry on Longshore Industry Work Stoppage, October-November, 1951, Port of New York, Jan. 22, 1952, pp. 48-49), for practical and economic reasons, this practice can be taken advantage of only by the large shipping companies who require a large and regular work force of longshoremen, like Moore McCormack Lines, Inc. and Grace Lines, Inc.

Further, the fundamental intention of the Act, to protect the longshoremen as he worked at his job, is seriously impaired by the decision below. As we have seen, the duty of the shipowner to a longshoreman for injuries has been described as an important factor in accident prevention. "Longshore Safety Survey," *supra*. The shipowner who contracts for his stevedoring with an independent stevedore will tend to be motivated towards safety efforts because of his liability for damages, as well as the fact that he indirectly bears the cost of workmen's compensation through the stevedoring firm's charges. This is not a question of the personal inclinations of the shipowner, but merely a recognition of the established fact that the possibility of legal liability will result in increased safety measures. (Hearings, Comm. on Ed. & Lab., Sp. Subcom., 84th Cong. 2nd Sess., "Longshoremen & Harbor Workers Compensation Act (3rd Party Liability)," Statement of the Assn. of the Bar of the City of New York, p. 110; *ibid.*, Testimony of Albert E. Rice, Counsel, American Merchant Marine Institute, Inc., p. 120.)

The policy of the law has been shaped in response to the specific needs of workers who are daily exposed to the risks inherent in maritime work and are helpless to provide adequately for their own safety. If the standards required by safe work practices are not met and injury results, the worker is entitled to be compensated in damages.

Sinkler v. *Missouri Pacific Rd. Co.*, — U. S. —, 26 L. W. 4253 (decided April 28, 1958);
Kernan v. *American Dredging Co.*, 355 U. S. 426 (1958);
Seas Shipping Co. v. *Sieracki*, *supra*.

The decision of the Court below also appears to be in conflict with the policy of the law as set forth in the above cases.

5. The District Court relied heavily upon the decisions in *Smith* v. *The Mormacdale*, 198 F. 2d 849 (3rd Cir. 1952), *cert. den.* 345 U. S. 908, and *Samuels* v. *Munson S. S. Line*, 63 F. 2d 861 (5th Cir. 1933). In both cases a longshoreman's libel *in rem* against the vessel to recover for injuries sustained was dismissed, on the basis of the Longshoremen's and Harbor Workers' Compensation Act, where the longshoreman was directly employed by the shipowner. In the *Samuels* case, Judge Bryan stated, without the citation of any authority, that Congress did not intend to declare a ship to be a "third person" as to her owner in regard to a claim against the ship by an employee of the owner. Without any specific matter to rely upon in support of its contention, that Court proceeded to assume that Congress, without saying so, had intended to eliminate the fundamental admiralty principle of the separate juridical personality of the vessel.

With all due respect to the wisdom of the Courts which decided the *Samuels* and *Smith* cases, the error in basic assumption made in the former case is compounded by the decision in the latter case. This, because in the *Samuels* case the Court stated that nowhere in the law of admiralty has a vessel been personified to the extent that it has been emancipated from its owner. This totally overlooks the many decisions which have held that in admiralty the vessel is personified to the extent that it is deemed completely emancipated from its owners.

The ship has long been recognized as capable of committing its own torts regardless of who is then in possession

of the ship or its appurtenances. It is liable *in rem* for its torts. *Canadian Aviator, Ltd.* v. *U. S.; supra.* Thus, the shipowner, by a libel *in rem* against the vessel has been held liable for the tort of its vessel, even during instances in which the ship has been converted, without its owner's knowledge or consent, into a pirate ship, *U. S.* v. *The Brig Malick Alhel*, etc., 2 How. 210, 11 L. Ed. 239, or where the tort was committed by a servant of a bareboat charterer, *The Barnstable*, 181 U. S. 464 (1901); and in other instances where the owner, out of possession, was nevertheless called upon to respond in damages, by the maritime lien on its ship, for the tort of another who was then in control of the vessel. *The John G. Stevens*, 170 U. S. 113 (1898).

The "well established distinction in admiralty between the ship owner and the ship," *Atlantic Steamer Supply Co.* v. *The S. S. Tradewind*, 153 F. Supp. 354, 357 (D. Md. 1957), is further illustrated by the often repeated pronouncements of the admiralty principle of the separate entity of the vessel.

In any event, the validity of the *Smith* and *Samuels* cases should now be reviewed by this Honorable Court, in view of the growing importance of this question, and the fact that Congressional intent has not been finally passed upon under the pertinent section of the Longshoremen's Compensation Act, and in the light of historical maritime developments.

6. In regard to the decision of the Court below, there is substantial conflict with a significant decision by other Judges of that same Court in *Grillea* v. *United States*, 232 F. 2d 919 (2nd Cir. 1956), *reversing* 229 F. 2d 691, involving a suit by an injured longshoreman who was directly hired by the bareboat charterer (Moore McCormack Lines Inc.) of a vessel owned by the respondent United States. The Court held in *Grillea* that the *in rem* liability of the vessel entitled the libelant to recover damages for its unseaworthiness, although Moore McCormack Lines, the em-

ployer, had agreed in the charter to indemnify the government against any lien arising under its operation, and although that company had made workmen's compensation benefits available.

In the instant case the District Court, in dismissing the petitioner's libel, declared "This libelant by his libel is seeking, * * * to do by indirection what he could not do directly." In contrast to this, the Court of Appeals in the *Grillea* case stated: "we see no reason why a person's property should never be liable unless he or someone else is liable 'in personam'," immediately after noting that the employer's liability under the Longshoremen's Compensation Act was only for compensation. Thus, the "indirect" method pursued by the petitioner here—a libel *in rem* of the vessel—assuming *arguendo* that he could not "directly" hold the owner of the vessel liable, while condemned by the District Court in the opinion below, was held to be proper and permissible in the *Grillea* case. The conflict between the principle enunciated in *Grillea* v. *U. S.*, and the opinion of the District Court as affirmed herein, is a clear manifestation of opposing views dealing with the fundamental admiralty concept of independent liability based on the separate personality of the vessel.

Additional proof of the underlying conflict between the *Grillea* decision and the instant case is found in the refusal of the Court in *Grillea* to give any weight to the *Smith* and *Samuels* decisions, although the final result of allowing the suit as a libel *in rem* in the *Grillea* case was that the libellant-longshoreman's employer ultimately had to bear the cost of damages; a result rejected in both the *Smith* and *Samuels* cases.

Although the District Court opinion herein states that the Longshoremen's Compensation Act was not invoked, and that the *Smith* and *Samuels* cases were not cited in the briefs on appeal in the *Grillea* case, investigation reveals that this is incorrect and that both cases were in fact cited in the appellee's answers to the petition for re-hearing.

In rebuttal to the contention of the appellee that the immunity of Grillea's employer under the Compensation Act "extends to the vessel under the operation and control of the employer-bareboat charterer" (Appellee's Answer to Appellant's Supplementary Brief), the Court of Appeals stated in its opinion, as noted above, "we see no reason why a person's property should never be liable unless he or someone else is liable 'in personam'."

VII.

Reasons for Granting the Writ

1. The Court below has adopted an improper interpretation and application of the Federal Longshoremen's Compensation Act, which results in depriving a large section of maritime workers of significant rights under the General Maritime Law of the United States and/or the Jones Act.

2. The decision of the Court below discriminates between longshoremen in giving some the right to sue for damages (if the ship happens to be operated by a third party), and denying this right to others, though they be sent by the same union local, if their injuries happen to occur on a vessel operated by a steamship company, which employs them directly.

3. The decision of the Court below results in unwarranted economic benefits in favor of the larger steamship companies, which are able to employ their seamen longshoremen directly, to the detriment of the steamship companies which must generally employ them through independent stevedoring firms, and provide third party liability coverage.

4. The Court below has failed to give effect to the intent of Congress, and the decisions of this Honorable Court, in dealing with the statutory and common-law rights involved herein.

5. The foregoing represent legal questions of importance to the maritime industry which have not been, but should be, reviewed by this Honorable Court.

WHEREFORE, your petitioner prays that a writ of certiorari may issue, directed to the United States Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court a full and complete transcript of the record of all proceedings had in said Court in the above entitled case, to the end that said cause may be reviewed and determined by this Court as provided by law, and upon said determination to reverse the judgment of the Court of Appeals and direct that judgment be entered accordingly, or for such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
June 10th, 1958.

Respectfully submitted,

STANDARD, WEISBERG, HAROLDS & MALAMENT,
VINCENT J. LONGHI,
Attorneys for Petitioner.

LOUIS R. HAROLDS,
of Counsel.

APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 167—October Term, 1957.

(Argued February 7, 1958 Decided March 13, 1958.)

Docket No. 24648

WILLIAM BENNETT,

Libellant-Appellant,

against

S. S. MORMACTEAL, her engines, etc. and MOORE McCORMACK LINES, INC.,

Respondents.

Before:

MEDINA, WATERMAN and MOORE,

Circuit Judges.

Appeal from a final decree of the United States District Court for the Eastern District of New York, in Admiralty, Matthew T. Abruzzo, *Judge*. Opinion below not reported.

Affirmed.

VINCENT J. LONGHI, New York, N. Y. (Standard, Weisberg, Harolds & Malament, Louis R. Harolds, New York, N. Y., of Counsel), *for libellant-appellant.*

KIRLIN, CAMPBELL & KEATING, New York, N. Y. (Joseph M. Cunningham, Walter X. Connor, Thomas F. Feeney and James H. Reidy, New York, N. Y., of Counsel), *for respondents.*

PER CURIAM:

The decree is affirmed on the opinion of Judge Abruzzo, filed April 2, 1957.

APPENDIX B

Opinion of Trial Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

April 2, 1957

VINCENT J. LONGHI, Proctor for Libelant; WILLIAM L. STANDARD, of Counsel; LOUIS R. HAROLDS, on the Brief.

KIRLIN, CAMPBELL & KEATING, Proctors for Respondent, Moore-McCormack Lines, Inc.; JOSEPH M. CUNNINGHAM and THOMAS F. FEENEY, Advocates.

ABRUZZO, *D. J.*:

The libelant, a longshoreman employed by Moore-McCormack Lines, Inc., to do stevedoring work on the vessel Mormacteal owned by his employer, has filed a libel in rem against the vessel and in personam against the shipowner, his employer, alleging that he was injured on May 29, 1953, when a hatch cover gave way beneath him because of the unseaworthiness of the vessel, its appliances and appurtenances. Moore-McCormack Lines, Inc., was doing its own stevedoring work.

Moore-McCormack has filed exceptions and exceptive allegations to the libel and now moves to sustain these exceptions and exceptive allegations and to dismiss the libel.

The gravamen of Moore-McCormack's motion is that the libelant was subject exclusively to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. 901, et seq., particularly Section 905, and

having complied with the terms and its obligations under the Act by securing compensation for its employees as provided by the Act, it is immune from any liability excepting that contained in Section 905 which provides as follows:

> "§ 905. *Exclusiveness of liability.* The liability of an employer prescribed in section 904 of this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. * * * " (Mar. 4, 1927, c. 509, § 5, 44 Stat. 1426.)

This Court is being asked to determine whether a longshoreman injured on board a ship may maintain a libel in personam or in rem against the ship on the grounds of unseaworthiness where the vessel so libeled is owned by libelant's employer and the employer has secured the payment of compensation under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, *supra*.

The Circuit Court of Appeals for the Third Circuit, in the case of *Smith* v. *The Mormacdale*, 198 F. 2d 849, in a long, well-reasoned opinion held that under circumstances similar to those in the instant case a libel could not be maintained because the Longshoremen's and Harbor Workers' Compensation Act was the exclusive remedy accorded to a longshoreman.

The Circuit Court of Appeals for the Fifth Circuit, in the case of *Samuels* v. *Munson S. S. Line*, 63 F. 2d 861,

where the facts were identical with the case at bar, also held that a libel could not be maintained.

Conzo v. *Moore McCormack Lines*, 114 F. Supp. 956 (S. D. N. Y.), followed the reasoning in the *Smith* and *Samuels* cases, *supra*.

In this Circuit, in *Grillea* v. *United States*, 229 F. 2d 687, the Circuit Court of Appeals affirmed a judgment dismissing a libel filed by a longshoreman injured aboard a vessel. The Longshoremen's and Harbor Workers' Compensation Act was not invoked. Upon a rehearing before the same judges, the dismissal of the libel was reversed, 232 F. 2d 919. The instant libelant contends that the second *Grillea* case supports his contention that he can libel the vessel. The facts in the *Grillea* case are somewhat different than in the present libel and that case is distinguishable from the *Smith*, *Samuels* and *Conzo* cases, *supra*.

Moore-McCormack, the respondent in the present action, was the charterer in the *Grillea* case; Moore-McCormack had chartered the ship from the United States Government. One of the conditions of the charter was that the United States Government, the owner of the vessel, was to be indemnified as owner out of possession and control against any lien arising out of the operation of the vessel by the charterer, Moore-McCormack. That factor affected the decision in the *Grillea* case and is borne out by the language in the opinion which reads as follows (pp. 923-924):

> "That does not indeed answer the question whether a maritime lien can be imposed upon a ship for a claim on which no jural person is liable 'in personam.' Moreover, although in the case at bar the demisee was liable under the Longshoremen's and Harbor Workers' Act, § 901 et seq., Title 33, U. S. C. A., the liability was only for compensation—a claim different from that in suit, both in kind and amount. So far as we have found, this is a question that has never come up in the books, although, as *res integra*, we see no reason why a person's prop-

erty should never be liable unless he or someone else is liable 'in personam.' That would amount to saying that there should be no limited liability without fault, although unlimited liability without fault is not infrequently imposed. *Be that as it may, a demisee who is under only a limited liability to his employee may make himself liable to the demisor for full recovery in case the demisor is so liable to the employee. That will be true if the demisee has broken a contract with the demisor and the injuries to the employee measure the damages for the breach. In the case at bar the demisee had made such a contract, for the charter (Clause 27) contained the following promise: 'The Charterer shall indemnity the Owner against any lien * * * arising out of the operation of the Vessels by the Charterer.' Therefore, even though one thought it unjust as between the two that the demisor should be liable for full damages when the demisee was not, this clause is an answer.*" (Italics supplied.)

* * *

It is apparent that the indemnity clause had some effect in the decision in favor of the libelant. The law as determined by the Third and Fifth Circuits in the *Smith* and *Samuels* cases, *supra*, is determinative of the instant case. Neither of these cases, nor the *Conzo* case, *supra*, was cited in the briefs on appeal in the *Grillea* case. The Circuit Court did not consider the specific point involved in this motion.

Seas Shipping Co. v. *Sieracki*, 328 U. S. 85, holds that a shipowner's obligation of seaworthiness extends to a longshoreman injured while doing stevedoring work aboard a ship, but employed by an independent stevedore whom the shipowner has hired to load or unload the ship, and while working aboard a ship in navigable waters the longshoreman is comparable to some extent to a seaman because he is doing a seaman's work and incurring a seaman's hazard.

Notwithstanding that in the *Sieracki* case a longshoreman was held to have some of the rights of a seaman, the Court knows of no rule of law granting maintenance and cure to a longshoreman. He may not maintain an action under the Jones Act, 46 U. S. C. A. 688 (*Senko* v. *LaCrosse Dredging Corp.*, decided February 15, 1957, by the Supreme Court of the United States), nor can a longshoreman sue in admiralty if he was injured on land although engaged in loading or unloading a vessel (*Industrial Comm.* v. *Nordenholt Co.*, 259 U. S. 263). The Longshoremen's Act was enacted to provide compensation for a class of employees at work on a vessel in navigable waters who, although they might be classed as seamen, were still regarded as distinct from members of a "crew" (*South Chicago Co.* v. *Bassett*, 309 U. S. 251, 261).

This libelant by his libel is seeking, it appears, to do by indirection what he could not do directly. The ship which was libeled, the owner, and the stevedore, Moore-McCormack, are one and the same entity. In the *Grillea* case, great stress was pointed to the written contract of indemnity in fixing the liability on the owner of the vessel for any liens incurred during its charter. That was one of the dominant reasons for holding the *Grillea* libel in rem was sustainable.

There are a tremendous number of longshoremen working for various corporations in this harbor and, where the owner of any steamship does its own stevedoring work, it should have the right to not only place a legal limit on its own liability but know to what extent it is responsible and liable to its longshoremen and thereby be in a position to add the cost of its liability to its cost of operation.

The Court finds that the exceptions to the libel must be sustained and the libel dismissed.

M. T. Abruzzo,
U. S. D. J.